MONTGOMERY v. COMMONWEALTH.*

Supreme Court of Appeals: At Richmond.

February 7, 1901.

1. CRIMINAL LAW—*Trespasser—Right to eject—Assault—Self-defence.* A land owner may order a trespasser off, and, if he refuses to go, may use the proper force to expel him, but he has no right to commit a breach of the peace in the outset. If he assault the trespasser, the latter may defend himself so far as is necessary to prevent bodily harm to himself. In the case at bar, the landlord had leased his premises to a tenant, and had no right to order the prisoner off, and the latter, when violently assaulted, had the right to defend himself.
2. CRIMINAL LAW—*Assault—Self-defence.* A person violently assaulted, after warning his adversary off, has a right to pause to ascertain whether his assailant has heeded his warning or is still pursuing, and does not thereby lose his right of self-defence.
3. CRIMINAL LAW—*Death of witness—Evidence on former trial.* In a criminal case, the testimoney given on a former trial by a witness since deceased cannot be given in, even on the motion of the prisoner.

Error to a judgment rendered by the County Court of Rockbridge county on a prosecution for malicious assault. *Reversed.*

The opinion states the case.

Hugh A. White, for the plaintiff in error.

Attorney-General A. J. Montague, for the Commonwealth.

PHLEGAR, J., delivered the opinion of the court.

Daniel Montgomery was indicted in the County Court for Rockbridge county for maliciously cutting and wounding William E. Davidson, with intent to maim, disfigure, disable and kill, and was convicted and sentenced to four years' imprisonment in the penitentiary. This court, at its June term, 1900, set aside the judgment and verdict and awarded a new trial (2 Va. Sup. Ct. Rep. 257). The prisoner was again convicted, and a new trial was again awarded him by this court at its September term, 1900 (2 Va. Sup. Ct. Rep. 475). He has been convicted the third time, and sentenced to four years' imprisonment in the penitentiary. A writ of error was refused by the judge of the Circuit Court, and awarded by one of the judges of this court.

*Reported by M. P. Burks, State Reporter.

The two reversals were because of errors committed in instructing the jury. The case is now before us on the correctness of Instruction No. 9 asked for by the prisoner and refused by the court, and on the refusal of the County Court to set aside the verdict because contrary to the evidence.

The facts are substantially the same as on the first and second trials, except that it now clearly appears that the difficulty occurred on premises which were in the possession of John Randolph, a tenant of W. E. Davidson, and that Davidson was cut with the corn-cutter with which he assaulted Montgomery, and which the latter got from him in some way. The instruction referred to is as follows:

"The court further instructs the jury that if they believe from the evidence that Davidson got down off his horse and started toward the prisoner demanding the gun, and saying he would see about whether the prisoner would leave, this of itself was such a threat and demonstration on the part of Davidson as to warrant the prisoner in placing himself in a position to defend himself, and ward off the threatened assault, and if he jumped back with gun in hand, pointed and cocked at Davidson, and said, 'If you fool with me I will shoot you, damn you'; or said, 'Don't come here, for if you do I will shoot you, damn you'; and the prisoner added in quick succession the further words, 'I will shoot you.' These are not such threats on the part of the prisoner as warranted Davidson in picking up a corn-cutter and proceeding to attack the prisoner, and if you believe he did so, then you must regard Davidson as the attacking party, and find the prisoner not guilty."

The theory of the instruction is that Davidson by getting off of his horse, demanding the gun, and telling Montgomery he would see about his leaving when he got ready, made an unjustifiable assault upon him, which gave Montgomery the right to take measures for his defence; that by presenting the weapon, which was lawfully in his possession, as a menace to Davidson, with a distinct and fair warning that he would use it if he was further attacked, he did not give Davidson the right to arm himself with a deadly weapon, and with it to augment the dangers of the attack already begun.

That these conclusions are correct, we cannot doubt. Montgomery was on Randolph's premises, not on Davidson's, and the latter had no right to order him away. If he had been on Davidson's premises, the latter would have had the right to order him away, and if he refused to go, to use proper force to expel him; but that right did not authorize him to commit a breach of the peace in the outset. It is one thing to commit an assault and battery for the purpose of expelling a trespasser, and quite another thing to lay hands on him in a

proper manner solely to expel him. In the one case, the trespasser has the right to strike in defense; in the other, his right and duty are to go. If Davidson had only intended to use the proper force, he had no right to demand the gun. It did not belong to him, and no improper use had been made, or was threatened to be made, of it. No reasonable conclusion could be drawn from Davidson's acts and demand than that he intended to make an attack. Being in the wrong, his duty was to stop when warned that he would be shot. The warning did not put Montgomery in the wrong, but its disregard, the seizure of the corn-cutter and the quick and violent assault therewith entitled him to defend himself as far as necessary to prevent bodily harm to himself. The instruction would have so informed the jury, and should have been given.

The motion to set aside the verdict should have prevailed. The evidence shows that Davidson ordered Montgomery to leave premises which were not in his possession or under his control; that because Montgomery said he would go when he got ready, Davidson made an assault upon him, and a demand for Montgomery's property, which he would not have been justified in doing if Montgomery had been a trespasser on his possession; that Montgomery got up, warned Davidson that he would shoot him if he persisted, jumped back ten or twelve feet, was immediately set upon with great violence by a man armed with a dangerous weapon, was disarmed by his gun being discharged when knocked up by his adversary, and by its breaking in two from a lick which made bruises, but does not appear to have caused one moment's hesitation on Davidson's part, or to have lessened his ability to overcome Montgomery; that Montgomery, in the scuffle, got possession of the corn-cutter, gave Davidson one cut on the scalp about one and a half inches long, was pressed back thirty or forty yards, thrown to the ground and beaten by Davidson after he was down.

The witness, Randolph, testified that when Montgomery first jumped back "he stood," and it was urged that he then lost his right of defence by not continuing to retreat. We think not. The pause could only have been for a very small portion of time; for, in answer to the question, "How long was it from the time Davidson got off of his horse until they clinched?" Randolph replied: "It was very quick—shorter time than it takes you to ask it and me to answer it." After jumping back he would naturally pause for an instant. He had a right to pause and ascertain whether his adversary had heeded his warning and desisted, or was pursuing. It is useless to consume fur-

ther time on the facts of this case. In neither of the records which have been in this court, nor in all combined, is there sufficient evidence to warrant the conviction of the prisoner.

If the Commonwealth shall again put the prisoner on trial, another point made in the petition may arise, and therefore we will pass upon it. The court refused to permit the prisoner to prove what was testified to by W. E. Davidson on the first trial, Davidson having since died.

This point will be best disposed of by quoting what Judge Allen said in *Brogy's Case*, 10 Gratt. 732–3. Referring to the opinion in *Finn's Case* (5 Ran. 701), he says: "After stating that, in civil cases, where the witness is since dead, what he swore on a former trial may be given in evidence, the judge proceeds: 'But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly decided otherwise.'" And all the judges concurred in the opinion that the evidence was inadmissible.

"This decision has never been controverted in Virginia since. The whole Criminal Code has since undergone a revision, but the rule, as laid down in *Finn's Case*, has been acquiesced in both by the courts and the legislature. I do not think it necessary, therefore, to go into the enquiry whether the rule was originally founded on proper principles or not. The rule has been established and recognized, and, I think, should be adhered to; and, whether a foundation had been laid for its introduction or not, the exidence was properly excluded."

Since the opinion of Judge Allen in the *Brogy Case* the criminal laws have thrice been revised, and, as the legislature has not seen fit to disturb the rule, we feel bound by the decisions.

We think the evidence of Davidson's former testimony was properly excluded.

The judgment must be reversed, the verdict set aside and the case remanded to the County Court of Rockbridge for a new trial, if the court and prosecuting attorney consider that a better case can be made out. *Reversed.*

NOTE.—The chief point of interest in this case is the decision as to the admissibility, in a criminal case, of the evidence of a deceased witness, given on a former trial of the same case.

The court decides that such testimony is not admissible—not even when offered by the prisoner himself.

We cannot but regard this as a most unfortunate decision—the more unfortunate in that it seems to lack both reason and authority for support.

In a learned article by Rudolph Bumgardner, Esq., in 2 Va. Law Reg. 807, it is shown, after a review of the authorities, that this rule, now for the first time judicially promulgated in Virginia, is practically without authority to sustain it, either in England or America.

In *Mattox* v. *U. S.*, 156 U. S. 237, the Supreme Court of the United States reviewed the question at great length, with the conclusion, announced by Mr. Justice Brown, that "the rule in England is clearly the other way. . . . . As to the practice in this country, we know of none of the States in which such testimony is now held to be inadmissible."

And so are the text-writers generally. Some of the courts, however, exclude such testimony when the witness is merely absent from the commonwealth. See 1 Greenleaf's Ev. (13th ed.) 163, and note.

That the Virginia court should now unanimously adopt a rule of evidence which has been thoroughly examined by courts and text-writers for a century, and by them with one voice repudiated, will naturally provoke widespread interest in the opinion by which the court justifies its position. Not local practitioners only, but studious lawyers throughout the country, and future commentators on the law of evidence, will turn with curious interest to *Montgomery's Case*, decided in 1901 by the Virginia court to study the line of reasoning by which that court overturns an old and bed-rock rule of evidence. It is to be feared that these learned seekers after legal truth will be disappointed when they find that this is the justification for the bold stand taken by the Virginia court:

In 1827, in *Finn's Case* (5 Rand. 701, 708) an excellent Virginia judge, in a case where the question was not involved—the case there being that of a witness *absent from the commonwealth*, to which a manifestly different principle is applicable —said: "We *cannot find* that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise. Peake, 60, quoting *Fenwicke's Case*, 4 St. Trials." It will be noticed that the judge in this *dictum* was not consciously establishing a new rule of law, but was following the dim light of such authority as was at hand—to-wit: "Peake, 60, quoting *Fenwicke's Case*, 4 St. Trials." Later, in *Brogy's Case*, 10 Gratt. 722, 732, another excellent Virginia judge, in another case where the question was again as to the testimony of an *absent*, and not a *deceased*, witness, quoted the former *dictum* with approval. And finally, when the question is for the first time squarely presented—when "Peake, 60, quoting *Fenwicke's Case*, 4 St. Trials" has for nearly a century been universally discredited on this point, by the easily discovered fact that *Fenwicke's Case* involved no such question [see Mr. Bumgardner's article (*ubi supra*) and *Mattox* v. *U. S.* (*supra*)]—the Supreme Court of Virginia, without noticing the authorities, or discussing the wisdom or unwisdom of the rule it was rejecting, announces that inasmuch as the legislature has several times revised the Criminal Code since the opinion in *Brogy's Case*, without disturbing the rule, the court feels "bound by the decisions."

It would be doing violence to fact to presume that the legislature keeps track of even the express decisions of the Court of Appeals. The presumption becomes more violent when applied to the mere *dicta*.

The court clearly announces as its opinion, following the opinion in *Brogy's Case* (*supra*) that if, after a particular ruling by the appellate court, in a criminal case, the criminal laws are revised without altering the rule so established, the

precedent is beyond the power of the court to alter, and practically becomes statute law. If this be true, the same principle must apply in civil cases. Hence it follows that as the whole statute law of this State, civil and criminal, was revised by the Code of 1887, every previous decision of the appellate court, good, bad and indifferent, not altered by the Code, was thereupon placed beyond the power of the court to overrule or qualify, and became, substantially, statute law.

This is the logical result of the decision in the principal case, but it is scarcely necessary to point out that the court has many times overruled precedents established by the same tribunal before the adoption of the Code, and not altered in the general revisal.

CORE V. CITY OF NORFOLK.*

Supreme Court of Appeals: At Richmond.

February 7, 1901.

1. CONDEMNATION PROCEEDINGS—*Effort to purchase—Condition precedent.* A city council has no power to institute, and the courts no jurisdiction to entertain, any proceeding to condemn lands wanted for the purposes of the city, until after the council has made an unsuccessful attempt to purchase them from the owner. This is in the nature of a condition precedent, and compliance therewith must affirmatively appear in the proceedings.
2. CONDEMNATION PROCEEDINGS—*Effort to purchase—Preliminary correspondence.* Before instituting condemnation proceedings, it is the duty of a city council, after it has been determined to open or extend a street, to make a *bona fide* effort to agree with the owner of lands needed for the street for the land wanted. Preliminary correspondence to ascertain the price of the land, before it has been determined to open or extend the street, is not a sufficient compliance with sec. 1074 of the Code.

Error to a judgment rendered by the Corporation Court of the city of Norfolk, in a condemnation proceeding, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant.

Reversed.

The opinion states the case.

Walke & Old, for the plaintiff in error.

Walter H. Taylor, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

These proceedings were instituted under chapter 46 of the Code by the Common and Select Councils of the city of Norfolk for the purpose of condemning certain lands of the plaintiff in error for its uses as a street.

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* Reported by M. P. Burks, State Reporter.